

STATE OF MICHIGAN  
IN THE SUPREME COURT  
Appeal from the Michigan Court of Appeals  
(Saad, P.J., and Sawyer and Hoekstra, JJ.)

JULIE A. PUCCI,

Plaintiff-Appellant,

v

CHIEF JUDGE MARK W. SOMERS, In his  
individual capacity,

Defendant,

and

19TH JUDICIAL DISTRICT COURT,

Garnishee Defendant-Appellee.

Supreme Court No: 153893

Court of Appeals No. 325052  
Wayne County Circuit Court  
LC No. 13-014644-CZ

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PLAINTIFF-APPELLANT'S  
REPLY BRIEF IN SUPPORT OF HER  
APPLICATION FOR LEAVE TO APPEAL

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## INTRODUCTION

Plaintiff-Appellant Julie Pucci was awarded a judgment against Judge Mark Somers in his individual capacity because he violated her constitutional rights when he reorganized the court and eliminated her job as the Deputy Court Administrator. After judgment was fixed, Chief Judge Richard Wygonik, on behalf of the 19<sup>th</sup> District Court, elected to indemnify Somers for the personal capacity judgment as authorized by MCL 691.1408(1). This is undisputed.

The Court of Appeals acknowledged that “a Chief Judge can adopt an indemnification policy that covers the court’s court employees and judges while acting in their official capacity,” Then, nevertheless, stated “we do not believe that this power extends to indemnifying judges for liability incurred in their personal capacity.” (Appx 9a.) This ruling was clearly erroneous because it ignored the express language of MCL 691.1408(1) and the law of the case that Somers had acted in his official capacity when he terminated Pucci. (Appx 11a-21a.)

In its response, the 19<sup>th</sup> District Court argues that its chief judges lacked authority to speak for the court and indemnify Somers. Instead, the 19<sup>th</sup> District Court argues that only the funding unit (the City of Dearborn) can exercise this option. This position is unsupportable because it runs afoul of the plain text of MCL 691.1408(1) and violates the separation of powers doctrine.

MCL 691.1408(1) unambiguously allowed Chief Judge Wygonik to indemnify Somers for the judgment on behalf of the 19<sup>th</sup> District Court *after* judgment was entered. (Appx. 28a). The erroneous decision of the Court of Appeals impacts all public employers and employees, including local funding units, judges, judicial staff and court administrators. Accordingly, this Court should grant Plaintiff’s Application for Leave.

## ARGUMENT

### A. MCL 691.1408(1) AUTHORIZED THE 19<sup>TH</sup> DISTRICT COURT TO INDEMNIFY JUDGE SOMERS AND ASSUME FINANCIAL RESPONSIBILITY FOR PAYMENT OF THE JUDGMENT.

Pucci may seize Somers' personal assets to satisfy the judgment awarded against him. MCL 600.4011; MCR 3.101. An indemnification agreement to assume payment for a debt is a personal asset of the indemnitee subject to execution by the judgment-creditor. *Royal Oak Township v. City of Berkley*, 309 Mich. 572, 580 (1944); *City of Holland v. Township of Fillmore*, 363 Mich. 38, 42-44 (1961). Pucci, therefore, may enforce the 19<sup>th</sup> District Court's obligation to indemnify Somers for the *Pucci* judgment<sup>1</sup>. See generally 6 Am Jur 2d *Attachment and Garnishment*, § 2 (2013); MCL 600.4011; MCR 3.101. This is prosaic black letter law and the purpose for issuance of the subject *Writ*.

In the federal collection proceedings, Judge Lawson noted "The [indemnification] policy appears to track other such administrative provisions adopted by other district courts around the state but the timing of the adoption by the Nineteenth District Court ought to raise eyebrows, as it was signed by Judge Somers eight days before trial." *Pucci v Somers*, 962 F Supp 2d 931, 934 (ED Mich, 2013). Now, the 19<sup>th</sup> District Court latches upon that observation and challenges the efficacy of its indemnification policy based on timing and motive, notwithstanding the undisputed fact that Chief Judges Wygonik and Salamey elected to indemnify Somers *after* judgement was entered. The 19<sup>th</sup> District Court invites this Court to follow the Court of Appeals' judicial amendment of the statute by adding timing and motive as new criteria under MCL 691.1408(1) even though such factors are not mentioned in the statute.

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<sup>1</sup> Pucci's claim against the 19<sup>th</sup> District Court is not based on vicarious liability or *respondeat superior*. The 19<sup>th</sup> District Court is liable because it elected to indemnify Somers for the judgment.

If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236 (1999). MCL 691.1408(1) makes no reference to timing or motivation for a governmental agency's election to indemnify a governmental agent or employee. In *Whitman v City of Burton*, 493 Mich 303 (2013), this Court refused to read motive into a statute that made no reference to term.<sup>2</sup> The same is true with MCL 691.1408(1). Had the Legislature intended timing or motive to matter it would have said so. It did not.

The triggering event under MCL 691.1408(1) for a governmental agency to elect to indemnify a governmental worker is "*Whenever a judgment for damages is awarded against an officer, employee, or volunteer*" of the agency for the work-related tort. This means that a governmental agency may elect to indemnify a governmental worker once it knows the amount and nature of the judgment. *After judgment was awarded against Somers*. Chief Judge Wygonik filed an Affidavit that the 19<sup>th</sup> District Court would indemnify Somers and assume full financial responsibility for the judgment. Even if the pre-judgment indemnification policy generated by Somers was somehow infirm (which it was not), the court's obligation to indemnify for the judgment was cemented by both Judge Wygonik and his successor, Chief Judge Sam Salamey.<sup>3</sup>

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<sup>2</sup> This Court, *supra* at 313, reasoned:

Because there is no statutory basis for imposing a motivation requirement, we will not judicially impose one. To do so would violate the fundamental rule of statutory construction that precludes judicial construction or interpretation where, as here, the statute is clear and unambiguous.

<sup>3</sup> Judge Salamey testified: "The court's position today would be simply stated that if the judge violates the Constitutional Rights [of an employee] within his, in the discharge of his professional duties at the court, then I believe that the court would be responsible." (Appx. 241a.) Nowhere in their Brief, does the 19<sup>th</sup> District Court reference Judge Salamey's clear and unequivocal testimony.

The 19<sup>th</sup> District Court agrees it is a “governmental agency” under MCL 691.1408(1) but contends that former Chief Judge Somers “is not a ‘governmental agency’” and “was not the individual authorized to exercise the indemnification power on the Court’s behalf.” (Ital. added) (GD BOA, p. 15.) This argument makes little sense. If not the Chief Judge, who?

Under Michigan law, the chief judge is the final policymaker for the district court authorized to initiate internal policies and coordinate the court’s finances, including the duty to “supervise the performance of all court personnel, with authority to hire, discipline, or discharge such personnel,” and “perform any act or duty necessarily incidental to carrying out the purposes of this rule.” MCR 8.110(B), (C)(2), (3)(d),(i); MCL 600.8221. Each 19<sup>th</sup> District Court Chief Judge was empowered, as the appointed administrator of the court, to exercise the court’s option under MCL 691.1408(1) to indemnify Somers for the judgment. Each lawfully did so.

Without any legal authority, the 19<sup>th</sup> District Court asserts that then Chief Judge Somers acted outside the scope of his authority under MCL 691.1408(1) because personal animus motivated his decision to terminate Pucci. “An actor’s intent and motivation have no bearing on the scope of his or her executive authority” under the GTLA. *Petipren v Jaskowski*, 414 Mich 190, 216 (2013). *See also, American Transmissions v AG*, 455 Mich 135, 143 (1997) (there is no “malevolent heart exception” under the GTLA.) Any additional requirements for statutory indemnification under MCL 691.1408(1) should be addressed to the Michigan legislature, not the appeals courts after an adverse ruling.

As a matter of law, Somers’ personal animus has no bearing on the scope of his authority as Chief Judge to reorganize the 19<sup>th</sup> District Court and terminate Pucci.<sup>4</sup>

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<sup>4</sup> The 19<sup>th</sup> District Court claim that the *Pucci* judgment is a “liability unrelated to the business of the Court” is a prevarication. (GD BOA, p. 2.) This falsehood is a transparent effort to confuse the Court. *All* of Pucci’s claims arose from the workplace and Somers’ exercise of his administrative

The 19<sup>th</sup> District Court's indemnification policy is valid and enforceable under the unambiguous text of MCL 691.1408(1).

**B. THE COURT OF APPEALS JUDICIALLY NULLIFIED STATUTORY INDEMNIFICATION UNDER MCL 691.1408(1).**

The 19<sup>th</sup> District Court disputes Pucci's contention that the Court of Appeals ruling negated statutory indemnification under MCL 691.1408(1). The Court held that the 19<sup>th</sup> District Court, as a governmental agency, could not indemnify Somers for the judgment because he incurred personal liability when he unlawfully discharged Pucci. Statutory indemnification only applies when the governmental worker (like Somers in this case) is personally liable for the work-related tort. It is axiomatic that without personal liability there is no need for indemnification.

MCL 691.1408(1) allows governmental agencies to indemnify public workers who are personally liable for damages caused in the course of their employment and within the scope of their authority. In *Wilson v Beebe*, 770 F2d 578, 588 (6<sup>th</sup> Cir 1985), the State of Michigan exercised its indemnification authority under MCL 691.1408(1) and voluntarily assumed the State Trooper's personal obligation to satisfy an individual capacity judgment for an unconstitutional shooting. Under the Court of Appeals holding, governmental agencies may only exercise the statutory option to indemnify where there is an "official capacity" judgment—*i.e.*, where only the agency (not the individual named) is liable for the judgment. The Court's ruling wipes away statutory indemnification for public employees like the Trooper in *Beebe* because he incurred liability in his personal capacity.

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powers as Chief Judge to fire her. (Appx 114a-136a.) Similarly, the argument that a chief judge could unilaterally increase his salary or require the court to make his car payments are red-herrings. The Michigan Constitution and MCL 600.8202 mandate uniform judicial salaries. Const 1963, Art §18. In contrast to the judgment awarded Pucci, a judge's car payment is unrelated to his judicial or administrative responsibilities and not subject to indemnification under the plain unambiguous text of MCL 691.1408(1).



The unforeseen ramifications from the Court of Appeals ruling cannot be overstated. Under the Court of Appeals decision, a governmental agency may only exercise its statutory election to indemnify a governmental worker for a work related tort where no personal liability attaches. This defeats the entire purpose of statutory indemnification under MCL 691.1408(1) and judicially alters the GTLA.

**C. INDEMNIFICATION FOR AN “OFFICIAL CAPACITY” JUDGMENT IS MEANINGLESS BECAUSE ONLY THE GOVERNMENTAL AGENCY IS RESPONSIBLE FOR THE JUDGEMENT.**

The 19<sup>th</sup> District Court interprets the Court of Appeals’ ruling to mean that a funding unit may only indemnify a judge or court employee where an “official capacity” judgment “imposes organizational liability.” (GD BOA, 7.) As a matter of law, an official capacity judgment is enforceable only against the governmental agency and not the person who committed the constitutional violation. *Hafer v Melo*, 502 US 21, 25 (1991). This argument reflects the illusory nature of the Court of Appeals’ holding and why it must be reversed.

**D. UNDER MICHIGAN SUPREME COURT AUTHORITY PAYMENT OF THE INDEMNIFICATION POLICY IS A LEGAL OBLIGATION OF THE ELECTORATE WHO MAY VOTE TO REMOVE A JUDGE FOR “POOR OR THOUGHTLESS ADMINISTRATION.”**

The only issue before the Court of Appeals was the validity of the indemnification policy, not who would pay for it. The 19<sup>th</sup> District Court impermissibly argues that payment of the indemnification obligation is an “appropriation” which required prior approval from the local funding unit. (GD BOA, 20.) This is not so and is another attempt by the 19<sup>th</sup> District Court to add criteria to MCL 691.1408(1) not included by the Legislature.

In *Cameron v Monroe County Probate Court*, 457 Mich 423 (1998), the Michigan Supreme Court held that the funding unit was required as a matter of law to satisfy a judgment entered

against a court for employment decisions made by a judge which violated the civil rights of a court employee. *Id.* at 429.<sup>5</sup> The *Cameron* Court, 457 Mich at 427-428, reasoned:

The county contends, correctly, that employment discrimination is not an "expense of justice." However, supervision and administration of court personnel is a necessary expense of justice for which the county is expected to pay. The mediation judgment entered against the county is the result of poor or inappropriate administration. *Just as the county would benefit from the wise and efficient administration of the judges its voters elect, so it suffers from the thoughtless and improper administration in the instant case. (Italics added.)*

*Cameron* is instructive. *Cameron* held that the funding unit's payment of a judgment against a court for a civil rights violation is a legal obligation as a matter of law, not an "appropriation" which required approval from the funding unit. Likewise, the 19<sup>th</sup> District Court's election to indemnify Somers is a legal obligation for which the voters who elected him into office are responsible.<sup>6</sup> *Cameron* wisely directs that the electorate (*not* the funding unit) is the proper "check and balance" for "thoughtless and improper administration in the instant matter." *Id.* Accordingly, the electorate may voice their displeasure with "poor or inappropriate administration" by its elected judges through the ballot box. *Id.*

#### **E. CRAWFORD COUNTY HAS NO APPLICATION TO THIS CASE.**

The 19<sup>th</sup> District Court claims that 46<sup>th</sup> Circuit Trial Court v Crawford County, 476 Mich 131 (2006), was "central" to the Court of Appeal's ruling. This is not true.

*Crawford County* involved a dispute between the funding unit and the circuit court to fund enhanced pension and retiree health care plans for court employees. It had nothing to do with an indemnification policy or MCL 691.1408(1). The *Crawford County* plurality held that under the judiciary's "inherent power" it may compel funding from the local funding unit only "when an

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<sup>5</sup> "If the probate court had been found liable to plaintiff, the county would be liable for any resulting judgment as a matter of law." *Id.* (Bold in original.)

<sup>6</sup> Somers was reelected twice during the pendency of this litigation.

impasse has arisen between the legislative and judicial branches, to determine levels of appropriations that are ‘reasonable and necessary’ to enable the judiciary to carry out its constitutional responsibilities.” *Id.* at 143-144. This is not the case here.

The 19<sup>th</sup> District Court has not requested (let alone compelled) any funds from the funding unit to pay for the indemnification policy. There is nothing in the record before the trial court in this case to support the 19<sup>th</sup> District Court’s new argument. Money to pay for the indemnification obligation will come “from the official coffers of the Court” not from the funding unit. (GD BOA, 2.) Unlike *Crawford County*, the funding unit is not a party and never moved to intervene. Unlike *Crawford County*, there is no funding dispute or “impasse.” Unlike *Crawford County*, this case has nothing to do with a court’s exercise of its “inherent powers” to compel funding. The 19<sup>th</sup> District Court’s authority to indemnify Somers is statutory. MCL 691.1408(1). *Crawford County*, simply has no application.

**F. THE AUTHORITY TO INDEMNIFY SOMERS RESTS EXCLUSIVELY WITH THE 19<sup>TH</sup> DISTRICT COURT UNDER THE SEPARATION OF POWERS DOCTRINE.**

The 19<sup>th</sup> District Court also cites *Judicial Attorney’s Ass’n v State of Michigan*, 459 Mich 291 (1998), to argue that it lacked authority to adopt the indemnification policy without prior approval from the City of Dearborn. On page 13 of its Brief, the 19<sup>th</sup> District Court quotes a passage from *Judicial Attorney’s Ass’n* but omits the operative portion underscored below:

It is, of course, well established, both as a practical and a constitutional matter, that in the exercise of its employment responsibilities the judiciary must take into account the limited dollars appropriated to it by the legislative branch in the exercise of the Legislature’s own constitutional responsibility. See, for example, *Bay Co*, 385 Mich. at 726-727, and *Ottawa Co*, *supra* at 603. The practical necessity for the judiciary to reach accommodation with those who fund the courts on an annual basis, however, cannot, as a constitutional matter, be used as an excuse to diminish the judiciary’s essential authority over its own personnel.

*Id.* at 302-302.

*Judicial Attorney's Ass'n* holds that, "as a constitutional matter," administrative employment decisions of court personnel rest exclusively with the judicial branch. *Id.*; MCR 8.110(C). So too does the Chief Judge's administrative decision to adopt an indemnification policy authorized in MCL 691.1408(1) or acquire liability insurance authorized in MCL 691.1409(1). This is exactly what the SCAO, the administrative arm of this Court, advises chief judges to consider. (Appx 459a.)

Courts are not the surrogates of the local funding unit. Granting the funding unit preemptive veto power over a court's decision to indemnify a judge or court employee for a work related liability is an unconstitutional encroachment on the autonomy of the judicial branch. Under *Judicial Attorney's Ass'n*, the 19<sup>th</sup> District Court's argument that only the City of Dearborn could elect to indemnify Somers for the judgment is a *per se* violation of the separation of powers doctrine.

**G. PUCCI MAY ENFORCE CHIEF JUDGE WYGONIK'S PROMISE THAT THE 19<sup>TH</sup> DISTRICT COURT WOULD INDEMNIFY SOMERS FOR THE JUDGMENT AS AN IDENTIFIED THIRD-PARTY BENEFICIARY.**

The 19<sup>th</sup> District Court argues that Pucci may not enforce Chief Judge Wygonik's unambiguous promise to indemnify Somers for the judgment as a third-party beneficiary. The 19<sup>th</sup> District Court is wrong.

In *Schmalfeldt v Northe Pointe Ins Co*, 469 Mich 422, 428 (2003), the only case cited by the 19<sup>th</sup> District Court on this issue, this Court explained:

A person is a third-party beneficiary of a contract only when that contract establishes that a promisor has undertaken a promise "directly" to or for that person. MCL 600.1405; *Koenig v South Haven*, 460 Mich. 667, 677; 597 N.W.2d 99 (1999). By using the modifier "directly," the Legislature intended "to assure that contracting parties are clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract." *Id.* An objective standard is to be used to determine, "from the form and meaning of the contract itself," *Kammer Asphalt v East China Twp*, 443 Mich. 176, 189; 504 N.W.2d 635 (1993) (citation omitted), whether the promisor undertook "to give or to do or to refrain from doing

something directly to or for" the person claiming third-party beneficiary status, *Brunsell*, *supra* at 298.

Here, then Chief Judge Richard Wygonik filed an Affidavit in federal court which identified and directly referred to Pucci as the plaintiff in the case caption. (Appx. 164a.) The Affidavit stated that "I have adopted that earlier indemnity policy and decided that the 19<sup>th</sup> District Court will indemnify Judge Mark Somers for the judgment or any settlement in the above captioned case, *Pucci v Somers*." (Appx. 165a.) Under *Schmalfeldt*, the Affidavit clearly encompasses Pucci who, as a matter of law, may enforce the promise as a third-party beneficiary.

### RELIEF REQUESTED

**ACCORDINGLY**, for the reasons contained in her principal Brief and this Reply, Plaintiff-Appellant Julie Pucci asks this Court to grant her Application for Leave to Appeal and either peremptorily reverse the opinion of the Court of Appeals entering a final order or otherwise allow the appeal to proceed.

Respectfully submitted,

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